Supreme Court, U.S.
FILED
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No. 02-629

In the Supreme Court of the United States

IN RE KATHLEEN G. ARNOVICK,
VALERIE L. COX AND
HENRY B. WANSKER,

Petitioners,

v.

UTAH STATE BAR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF UTAH

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Respondent Utah State Bar contends that review by this Court is unwarranted; however, the arguments of the Respondent in support of that position are predicated on mischaracterizations of law, fact and indeed, even the Petitioners' arguments. What this case presents to this Court is a decision that contravenes existing United States Supreme Court precedent, creates irreconcilable conflicts of authority among courts of higher jurisdiction and assures substantial and recurrent litigation. In effect, this case is worthy of review.

I. Respondent's Brief In Opposition rests upon conjecture and speculation, rather than evidence of record, in suggesting that this case involves a purely factual dispute.

A. Respondent's speculation as to the attributes of norm-referenced testing does not constitute evidence.

The Brief in Opposition of the Utah State Bar, (hereinafter, "BIO"), purports to define norm-referenced testing and then concludes that the July 2000 Utah Bar Examination was not a norm-referenced test. BIO 6-7. In fact, speculation by the Bar as to the attributes of such testing and its faulty conclusion regarding its own test do not constitute evidence at all, much less proof of the matter asserted.

The Respondent's lack of an evidentiary showing suggests that it eschewed the opportunity to have its test evaluated by an

expert or experts to establish that it passed Constitutional muster as a criterion-referenced test. It certainly failed and refused to review the expert opinion of the Petitioners' psychometrician, apparently because it failed to understand the significance of psychometrics in determining whether or not a test is criterion-referenced and therefore a proper measure of competency. It may not now supplant its lack of a qualified expert's opinion with conjecture, masquerading as proof.

B. The only expert evidence of record, indeed the only evidence of record, is that the July 2000 Utah Bar Examination was a norm-referenced examination.

Respondent presented absolutely no evidence upon the issue of whether the July 2000 Utah Bar Examination was either criterion-referenced or norm-referenced. The Petitioners employed the services of a psychometric expert, one whose job it is to make such determinations, to evaluate the Examination. The opinion of that expert unequivocally established that the Examination was norm-referenced. That opinion is not merely the only expert evidence of record upon the subject, it is the only evidence and it remains uncontraverted. To the extent that the Utah Supreme Court reached a contrary conclusion, it did so without a scintilla of evidence.

C. Notwithstanding the use of model answers by the Utah State Bar, its grading criteria were norm-referenced.

The Respondent suggests in its Brief in Opposition that it used model answers in the grading of the July 2000 Utah Bar Examination and because of this, its grading procedure was criterion-referenced. BIO 7. In fact, this assertion, apart from lacking any evidentiary basis, begs the question of the propriety of the grading methodology actually employed to grade the test. Rule 7-4 of the Respondent's own Rules Governing Admission to the Utah State Bar (hereinafter, "Rules") mandates that norm-referenced grading methodology be used to grade the essay portion of the examination. App. L at 114a. Notwithstanding the use of model answers, the graders were instructed by the Rules to compare each answer to an "average" answer which, by definition, can only be accomplished by reference to the performance of the test-taking group as a whole. This "average" standard is echoed by Section V. F. of the Respondent's Utah Bar Examiner's Committee Grading Handbook (hereinafter, "Handbook"). App. M at 149a-150a. It is also confirmed by the opinion of the Petitioners' psychometric expert (App. O at 165a).

For the Respondent to assert that there is evidence of record, much less expert evidence of record, upon which to ground a factual finding that the July 2000 Utah Bar Examination was a criterion referenced exam which tested for

minimum competency, is clearly erroneous. For the Utah Supreme Court to have drawn either factual or legal conclusions to that effect lacks any rational basis.

II. Respondent's Brief In Opposition rests upon mischaracterizations of the law to suggest that no legal conflict exists.

A. Equal Protection denials occurring when the Utah State Bar violated its own Rules are not remedied by according those aggrieved a "right" to re-take the Utah Bar Examination.

The Respondent asserts that denials of Due Process that may have been suffered by the Petitioners are easily remedied by their unqualified right to re-take the Examination. (BIO 9-10). Assuming *arguendo*, that it were correct in that assertion, the Respondent fails to address separately the merits of the Petitioners' Equal Protection concerns. The Respondent has cited no authority which suggests that re-taking the Examination would constitute an adequate remedy for the denial of Equal Protection. Nor has the Respondent cited authority suggesting that the Petitioners are not entitled to relief if they were denied admission to the Utah State Bar under a defective testing protocol or in the face of multiple, intentional and consequential violations of mandatory Bar Rules while others similarly situated were admitted. The Petitioners believe that no such authority exists and that, in consequence, this question is

among the most worthy of review of those presented.

B. Respondent's subjective opinion that it complied with its Rules regarding its discovery obligations to the Petitioners does not satisfy its Constitutional obligation to accord the Petitioners Due Process.

In the case at bar, the Utah State Bar, acting as agent of the Utah Supreme Court, denied certain of the Petitioners' discovery requests which were necessary to prove some of their allegations of impropriety in the composition, administration and grading of the July 2000 Utah Bar Examination. Thereafter, the Utah Supreme Court, acting in its capacity as the arbiter of a conflict in which it also had the role of principal, deemed a failure of the Petitioner's proof to have occurred. That the Respondent contends it met its minimum obligation to provide discovery as mandated by its Rules is not tantamount to its having met its Constitutional burden to accord the Petitioners Due Process. This is particularly true where the Petitioners' failure of proof was directly related to the Respondent's refusal to provide discovery.

On the one hand, the Respondent suggests that noncompliance with its Rules is excusable (BIO 10) and on the other, it seeks to cloak itself in a form of immunity for having complied with those Rules, if only subjectively

so (BIO 8). The Respondent simply may not have it both ways.

III. Respondent's Brief In Opposition rests upon mischaracterizations of the nature of Petitioners' arguments.

A. The Utah State Bar acted as agent of the Utah Supreme Court in administering the July 2000 Utah Bar Examination and not as a formal state administrative agency, enabled by legislation and entitled to judicial deference.

The Utah Supreme Court characterized the Utah State Bar as its "agent" in its decision in this case. In re Arnovick, 52 P. 3d 1246, 1248 (Utah 2002). At the same time the Utah court was careful to point out that the Bar was not constituted with the dignity of a full-fledged state administrative agency, enabled with its own rule making power and entitled to any judicial deference. *Id.* An entire body of Utah case law, cited in the Petition for Writ of Certiorari, establishes that the Utah appellate courts are strict in their requirements that Utah administrative agencies abide by their rules (State ex rel. Department of Community Affairs v. Utah Merit System Council, 614 P.2d 1259, 1263 (Utah 1980)), that a failure to do so is the quintessence of arbitrariness and capriciousness (Id. at 1263), that injury is presumed when such failure occurs (Krantz v. Utah Department of Commerce, Division of

Real Estate and Utah Real Estate Commission, 856 P. 2d 369, 371 (Utah App. 1993)) and that issues as to whether prejudice has occurred must be resolved in favor of those aggrieved (Angell v. Board of Review of the Industrial Commission, 750 P. 2d 611, 613 (Utah App. 1988)). Even the Utah Administrative Code, also cited in the Petition, requires as much. Utah Code Ann., Section 63-46b-16(4)(h)(ii).

The Respondent does not dispute that an administrative agency is constrained by its own rules, but somehow leaps to the conclusion that the Utah State Bar, because it is not a formal administrative agency, need not be so constrained. Logically and legally, an entity acting in an agency capacity such as the Respondent may not rationally be heard to suggest that its actions are not equally as constrained as those actions of other entities constituted with greater dignity. To urge the contrary results in the approval of ungoverned conduct as condemned by this Court and by the appellate courts of Utah. It also implicitly suggests that the Utah Supreme Court, as principal, be allowed to accomplish through the ungoverned conduct of its agent, something it could not accomplish on its own – disregard rules which preclude arbitrariness and capriciousness. Not even the Respondent claims that this would be acceptable, reasonable or rational.

In this case, the Utah State Bar's conduct is subject to mandatory review only by the Utah

Supreme Court. Since the relationship of these entities is one of principal and agent, review of the agent's conduct by the principal cannot logically be characterized as independent. The conduct of the agent should be beyond reproach when that conduct is not truly subject to mandatory, independent judicial review. Indeed, there will be independent judicial review in this case only if the Petition for Writ of Certiorari is granted.

B. Arguments presented in the Petition for Writ of Certiorari were timely asserted.

As noted at page two of the Petition for Writ of Certiorari, the Petitioners asserted their claims for denials of Due Process and Equal Protection in timely fashion and at the administrative level (App. I at 48a-49a, App. J at 64a-65a and App. K at 80a-81a). It has always been the *sine qua non* of the Petitioners' claims that they were denied admission to the Utah State Bar, without a rational basis, while others similarly situated were not. This is the essence of a claim for the denial of Equal Protection. Moreover, the Petitioners have always asserted that the hallmark of the July 2000 Utah Bar Examination was its composition, administration and grading under circumstances of multiple, intentional and substantial violations of mandatory Rules promulgated to circumscribe the Respondent's

conduct. This is the essence of a claim for the denial of Due Process.

The Petitioners point out that the Utah Supreme Court's decision contravenes even its own prior holdings, as well as those of this Court. This does not constitute the assertion of a novel legal theory not timely advanced. Likewise, the use of legal and factual analogy does not fail appellate muster.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for Writ of Certiorari, certiorari should be granted.

Respectfully submitted,

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